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## Have Justices Stevens and Kennedy Forged a New Doctrine of Substantive Due Process? An Examination of *McDonald v. City of Chicago* and *United States v. Windsor*

Douglas S. Broyles

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# HAVE JUSTICES STEVENS AND KENNEDY FORGED A NEW DOCTRINE OF SUBSTANTIVE DUE PROCESS? AN EXAMINATION OF *MCDONALD V. CITY OF CHICAGO* AND *UNITED STATES V. WINDSOR*

*By: Douglas S. Broyles*

## ABSTRACT

*As issues such as the nature of the sexual, marital, and other relationships and claims—both personal and economic—continue to face Americans and America’s lawyers, the question of how we as a people distinguish fundamental from non-fundamental rights is one of first importance. In constitutional law, the Supreme Court has addressed this question through the doctrine of “Substantive Due Process.”*

*In his lengthy dissent in McDonald v. Chicago—his final opinion as a Supreme Court Justice—Justice John Paul Stevens claimed that substantive due process is fundamentally a matter of how we interpret the meaning of the word “liberty.” The issue as to whether the right is specifically enumerated in the Amendments is irrelevant, Stevens argues, if the interest is naturally within the definition of “liberty.” Moreover, Justice Stevens’s argument in McDonald was approved by his liberal colleagues on the Court, which indicates that his theory of liberty may well become the baseline for determining what are, and what are not, fundamental rights. However, in the recent case of United States v. Windsor, the Court refused to employ the substantive due process doctrine, as traditionally understood, as the basis for striking down the Defense of Marriage Act (DOMA). Instead, the Court employed rational basis review, finding that the legislative purpose and effect behind DOMA was “to disparage and to injure” those wishing to enter into same-sex marriages, and thus served “no legitimate purpose.” Still, Justice Kennedy clearly signals in his Windsor opinion that some formulation of the substantive due process doctrine remains alive and well as a constitutional basis for deciding Fifth and Fourteenth Amendment Due Process “liberty” interests such as same-sex marriage. Indeed, both Justices share a conceptual core in their understandings of what constitutes a constitutionally protected liberty interest.*

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## I. INTRODUCTION

This Article will seek to elucidate the current and future state of the doctrine of substantive due process through an examination of two recent and seminal cases: *McDonald* and *Windsor*. The Article first considers Justice Stevens’s comprehensive theory of substantive due process as Justice Stevens set forth in his final Supreme Court opinion in *McDonald*. Part Two examines how and to what extent Justice Kennedy’s opinion in *Windsor* reflects (or alters) Justice Stevens’s theory in *McDonald*. Part Three reviews the opposing, historically based theory of substantive due process, as articulated by Justice Alito’s plurality opinion in *McDonald*, and Justice Scalia’s concurrence in *McDonald* and dissent in *Windsor*. Part Four examines the theoretical basis behind Justices Stevens’s and Kennedy’s understandings of constitutionally protected liberty interests. This Article concludes with a reflection on the constitutional merits of the respective liberal and conservative positions, and offers an alternative understanding of fundamental rights that is arguably more faithful to the understanding held by the Framers of the Constitution.

## II. PART ONE: JUSTICE STEVENS’S THEORY OF SUBSTANTIVE DUE PROCESS

Justice Stevens’s dissent in *McDonald* constitutes his final Supreme Court opinion; in effect, his swan song. In this, his final supreme effort, Justice Stevens seeks to set forth what he considers to be the definitive understanding of the doctrine of substantive due process.<sup>1</sup>

In *McDonald*, the Supreme Court confronted the question of whether the City of Chicago’s restrictive handgun ordinances violated the Second Amendment’s protection of the right to bear arms. The plurality ruled that the right in question is “fundamental to our scheme of ordered liberty” and system of justice and is “deeply rooted in the Nation’s history and tradition,” and consequently it is incorporated against the states under the Fourteenth Amendment’s Due Process Clause.<sup>2</sup> Justice Thomas concurred in the judgment, but argued that the right to bear arms is a fundamental right that should be applied against the states via the Privileges or Immunities Clause.<sup>3</sup> In

1. See *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). A person’s “swan song” is generally understood as a final work or accomplishment. It carries the connotation that the performer is aware that this is his or her last performance, such that every effort will be expended in one magnificent final effort.

2. *Id.* at 3036, 3042.

3. *Id.* at 3059.

effect, the *McDonald* plurality opinion simply applied its ruling from two years earlier in *District of Columbia v. Heller* against the states by selective incorporation via the Fourteenth Amendment's Due Process Clause.<sup>4</sup>

In his lengthy dissent in *McDonald*, Justice Stevens rejected the plurality's incorporation analysis, arguing instead that the constitutional question was "whether the interest in keeping in the home a firearm of one's choosing . . . is one that is 'comprised within the term liberty' in the Fourteenth Amendment."<sup>5</sup> Justice Stevens's argument is consistent with his longstanding contention that substantive due process is the constitutionally correct way in which to determine what rights are fundamental, and that this analysis is essentially a matter of determining what rights are comprehended under the meaning of "liberty" set forth in the Fourteenth Amendment.<sup>6</sup> In so doing, Justice Stevens rejects the analysis of the conservative members of the Court who "incorporate" against the states those rights they find to be "fundamental to our scheme of ordered liberty and system of justice" and "deeply rooted in this Nation's history and tradition."<sup>7</sup> As will be discussed, Justice Stevens contends for a different formulation of the test he believes correctly identifies those rights deserving of protection under his definition of "liberty."<sup>8</sup>

In his *McDonald* dissent, Justice Stevens stated definitively: "This is a substantive due process case."<sup>9</sup> Before turning to Justice Stevens's analysis of how substantive due process should be understood, however, let us briefly consider the doctrine in question.

The Due Process Clause of the Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."<sup>10</sup> The Fourteenth Amendment was proposed in 1866 and ratified in 1868. There exists general agreement that the Amendment's most immediate task was to make newly freed slaves full and equal citizens in the post-Civil War republic in light of the continuing abuses against the former slaves by many Southern

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4. See generally *id.*; *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (recognizing the Second Amendment's Right to Bear Arms as a fundamental right).

5. *McDonald*, 130 S. Ct. at 3107.

6. *Id.* at 3090.

7. *Id.* at 3034, 3036.

8. See generally D. Scott Broyles, *Doubting Thomas: Justice Clarence Thomas's Effort to Resurrect the Privileges or Immunities Clause*, 46 *IND. L. REV.* 341 (2013) [hereinafter Broyles, *Doubting Thomas*]. Justice Stevens does agree with the plurality to the extent that he rejects Justice Thomas's effort to identify fundamental rights through the Fourteenth Amendment's Privileges or Immunities Clause.

9. *McDonald*, 130 S. Ct. at 3090.

10. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment's Due Process Clause tracks the language of the Fifth Amendment's Due Process Clause, except that the former adds the language restricting State action. See U.S. CONST. amend. V.

States.<sup>11</sup> This was necessary because there was no constitutional vehicle by which state, as opposed to federal, violations of the rights protected under the Bill of Rights could be addressed. The Fourteenth Amendment also effectively overturned the Supreme Court's pre-Civil War decision in *Dred Scott v. Sanford*,<sup>12</sup> holding that the Constitution did not recognize blacks equal to whites, and, as such, blacks could not be considered citizens under the United States Constitution.

The language of the Due Process Clause itself suggests that it is purely procedural in nature, having no substantive content.<sup>13</sup> In other words, the Clause should not be used to challenge the substance of a law; it should only be used to ensure that proper procedures are in place regardless of the law's intrinsic merit.<sup>14</sup> This understanding of the Due Process Clause, however, changed over time.

In 1908, the Supreme Court explicitly recognized the possibility that the Due Process Clause could incorporate rights set out in the Bill of Rights against the states.<sup>15</sup> In 1925 the Court ruled that the states were bound by the Free Speech Clause.<sup>16</sup> But during roughly the same period of time, the Court recognized that fundamental rights that were *not* explicitly set forth in the Bill of Rights (unenumerated rights) were also protected by the Due Process Clause against State infringement.<sup>17</sup> The famous case of *Lochner v. New York* is considered the seminal case of what has been called the "economic due process era."<sup>18</sup>

As Justice Stevens pointed out in his dissent, the Court eventually abandoned economic rights (such as the right to contract) as rights unworthy of substantive due process protection.<sup>19</sup> The decisions in *West Coast Hotel Co. v. Parrish*<sup>20</sup> and *Nebbia v. New York*<sup>21</sup> set the

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11. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872) (holding the Fourteenth Amendment "is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other").

12. See *Dred Scott v. Sanford*, 60 U.S. 393, 413 (1856).

13. See, e.g., *McDonald*, 130 S. Ct. at 3058–88 (Thomas, J., concurring).

14. Indeed, there is a considerable body of scholarship that argues that the Fourteenth Amendment's Privileges or Immunities Clause was the clause that the Framers of the Fourteenth Amendment intended to be the vehicle for challenging the substance of laws. See Broyles, *Doubling Thomas*, *supra* note 8.

15. *Twining v. New Jersey*, 211 U.S. 78, 99 (1908), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964).

16. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

17. *Allgeyer v. Louisiana*, 165 U.S. 578, 587–88 (1897) (holding that the Due Process Clause protected the unenumerated right to contract).

18. *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding that New York laws restricting the hours of employment in bakery shops violated the right to contract enjoyed by employers and employees).

19. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3100 (2010) (Stevens, J. dissenting). This occurred around the time of the New Deal with the seminal case of *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (repudiating *Lochner* and upholding a state minimum wage law for women).

20. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 585–86 (1937).

21. See *Nebbia v. New York*, 291 U.S. 502, 539 (1934).

tone for the Court's deference to legislative discretion in the area of economic and property rights. Eventually, non-economic, personal rights—such as the right to raise one's children as one chooses and the right to privacy—came to be protected under substantive due process.<sup>22</sup> As will be seen, Justice Stevens wholly approves of the change in substantive due process jurisprudence.

Justice Stevens first addresses the obvious difficulty that the Due Process Clause, on its face, appears to be procedural in nature: “[No State shall] deprive any person of life, liberty, or property, without due process of law.”<sup>23</sup> However, Justice Stevens cites historical evidence, scholarship, Supreme Court cases, and logic in contending that “[p]rocedural guarantees are hollow unless linked to substantive interests . . . .”<sup>24</sup> In support of his argument, Justice Stevens cites his own dissenting opinion in *Meachum v. Fanno*, to the effect that the Due Process Clause guarantees certain pre-existing fundamental rights, such as liberty.<sup>25</sup> In *Meachum*, Justice Stevens argued that the transfer of prisoners to less-favorable institutions without adequate process violated their liberty interests: “I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.”<sup>26</sup>

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22. *McDonald*, 130 S. Ct. at 3090. It should be noted that during the *Lochner* era certain personal rights were also protected, such as the right of parents to control the upbringing and education of their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925); see also *Meyer v. Nebraska*, 262 U.S. 390, 399–403 (1923) (striking down a prohibition on teaching foreign languages to school children).

23. *McDonald*, 130 S. Ct. at 3090. Justice Thomas, for example, makes this point in his concurrence: “The notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.” *Id.* at 3062.

24. *Id.* at 3090–91.

25. *Id.* at 3091 (citing *Meachum v. Fano*, 427 U.S. 215, 230 (1976)).

26. *Meachum*, 427 U.S. at 230. In his reference to the language of the Declaration of Independence, Justice Stevens did not explain why these rights are “unalienable,” nor did he reference the Founders’ understanding of natural rights by virtue to which they could claim certain rights to be “unalienable.” In particular, Justice Stevens’s nod to the Declaration in *Meachum* omitted Jefferson’s explicit appeal to the “laws of Nature and Nature’s God.” In further support of his contention that the Due Process Clause is also substantive in nature, Justice Stevens also cites to several scholarly articles in a footnote, including Gedicks’s article, “arguing ‘that one widely shared understanding of the Due Process Clause of the Fifth Amendment in the late eighteenth century encompassed judicial recognition and enforcement of unenumerated substantive rights.’” *McDonald*, 130 S. Ct. at 3090 n.5. (quoting Frederick M. Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 594 (2009)). But Stevens entirely omits the major point Gedicks addresses: that Due Process of Law included an understanding of law bound by natural law.

One widely shared understanding of the Due Process Clause in the late eighteenth century encompassed judicial recognition of unenumerated sub-

After addressing the process versus substance issue, Justice Stevens sets forth his foundational argument, namely “that substantive due process is fundamentally a matter of personal liberty. For it is the liberty clause of the Fourteenth Amendment that grounds our most important holdings in this field.”<sup>27</sup> Justice Stevens makes an interesting and persuasive case that other approaches to understanding fundamental rights adopted by the High Court are somewhat misguided. In particular, he suggests that the use of the terms “privacy” or “equality”—while important “values”—are not as helpful to the substantive due process analysis as is the question of what is the proper understanding of “liberty.”<sup>28</sup>

Likewise, the “incorporation” doctrine framework, he maintains, “is something of a misnomer.”<sup>29</sup> Since the Fourteenth Amendment references “liberty,” it is of secondary importance whether the interest in question is found within the Bill of Rights.<sup>30</sup> With these observations in mind, Justice Stevens then directs the reader to his central point regarding substantive due process: “Whether an asserted substantive due process interest is explicitly named in one of the first eight amendments to the Constitution or is not mentioned [e.g., “privacy”], the underlying inquiry is the same: We must ask whether the interest is ‘comprised within the term liberty.’”<sup>31</sup>

What indeed is the understanding of “liberty” set forth in the Fourteenth Amendment? Justice Stevens forthrightly addresses this question, although, as will be argued, his answer is arguably less than

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stantive rights as limits on congressional power. This concept of “substantive” due process originated in Sir Edward Coke’s notion of a “higher law” constitutionalism, which understood natural and customary rights as limits on crown prerogatives and parliamentary lawmaking. The American colonies adopted higher-law constitutionalism in their revolutionary struggle and carried it with them through independence and constitutional ratification. Natural and customary rights limited the exercise of legislative power in the late eighteenth century through the normative definition of “law” inherited from the classical natural law tradition, which maintained that an unjust law was not really a “law.”

Gedicks, *supra*, at 585. In addition, Stevens’s quote of Tribe actually shows the limited substantive content accorded the Due Process Clause. See *McDonald*, 130 S. Ct. at 3090 n.5. (“[T]o qualify as ‘law,’ an enactment would have to meet substantive requirements of rationality, non-oppressiveness, and evenhandedness”) (quoting Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995)).

27. *McDonald*, 130 S. Ct. at 3091–92.

28. *Id.* at 3092. See Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 715 (2010) (“The Court’s move from privacy to liberty as a constitutional basis for the freedom to make fundamental life decisions strengthens the right itself by anchoring it to constitutional text in a text-happy era, and represents a victory for Justice Stevens, who has long advocated such a shift.”).

29. *McDonald*, 130 S. Ct. at 3092.

30. *Id.*

31. *Id.* (citing *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)).

satisfactory. To begin with, Justice Stevens maintains that Justice Cardozo's formulation in *Palko v. Connecticut* sets forth the "basic inquiry," which asks whether the challenged practice "violates values 'implicit in the concept of ordered liberty.'"<sup>32</sup> One might object that this merely begs the question of what criteria should be used to determine which or when certain "values" are "implicit" in ordered liberty. Justice Stevens, however, goes further and qualifies the liberty "values" in question, contending that they "have a universal character," as opposed to those values that are merely transitory, idiosyncratic, or the "personal preferences of their champions . . . ."<sup>33</sup> But instead of locating the universality of these liberty values in universal concepts such as the Founders' understanding of natural rights, Justice Stevens offers a somewhat vaguer characterization, explaining that this universality stems from either "a 'rational continuum' of legal precepts"<sup>34</sup> . . . or a seamless web of moral commitments, the rights embraced by the liberty clause transcend the local and particular."<sup>35</sup>

At this point Justice Stevens leaves us with two options for discerning when a liberty interest is sufficiently universal to deserve substantive due process protection. The first might fairly be described as something akin to *stare decisis*, at least when the decisions pass the test of rational consistency.<sup>36</sup> What falls within the category of moral commitments that form a "seamless web," however, cannot readily be described as self-evident, and Justice Stevens does not offer any specific examples of such moral commitments.<sup>37</sup> Justice Stevens does, however, warn the reader that metaphysical reason is not to be employed in locating either this seamless web of moral commitments or rational continuum of legal precepts: "Justice Cardozo's test undeniably requires judges to apply their own reasoned judgment, but that does not mean it involves an exercise in abstract philosophy."<sup>38</sup>

Instead of unconstrained "abstract philosophy," Justice Stevens provides a list of eight judicial guideposts for applying the Cardozo test. These include: (1) "historical and empirical data of various kinds," (2) "[t]extual commitments laid down elsewhere in the Constitution," (3) "judicial precedents," (4) "English common law," (5) "legislative and social facts," (6) "scientific and professional developments," (7) "practices of other civilized societies," and (8)

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32. *Id.* at 3096 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

33. *Id.*

34. *Id.* (citing *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

35. *Id.*

36. Justice Stevens does not provide us with a means to test this rational consistency, and perhaps none is available.

37. Certainly, no such seamless web can be found in recent substantive due process issues such as homosexual rights, abortion rights, or gun rights.

38. *McDonald*, 130 S. Ct. at 3096.



“above all else, the ‘traditions and conscience of our people . . . .’”<sup>39</sup> But, as will be demonstrated, it is Justice Stevens’s theory of “judicial precedents,” guided by his understanding of the movement of history, that ultimately drives Justice Stevens’s analysis of the meaning of “liberty.”<sup>40</sup>

At this point in his dissent, Justice Stevens returns to a criticism of the *McDonald* plurality’s interpretation of Justice Cardozo’s test in *Palko*.<sup>41</sup> This debate represents a minor skirmish involving competing analyses of text and precedent regarding how to interpret prior substantive due process cases, when in fact the real battle is over the soul of substantive due process. For Justice Stevens, this battle comes down to defining substantive due process rights either in terms of (past) history, or by interpreting the meaning of “liberty” in an historically forward-looking manner: “Nor, as the Court intimates . . . did *Duncan* mark an irreparable break from *Palko*, swapping out liberty for history.”<sup>42</sup> Moreover, Justice Stevens is quite candid in identifying the opposing camps and the irreconcilable substantive due process tests they employ. The test employed by the conservative members of the Court is found in *Washington v. Glucksberg*,<sup>43</sup> while *Lawrence v. Texas*<sup>44</sup> contains the test preferred by the Court’s liberal members:

I acknowledge that some have read the Court’s opinion in *Glucksberg* as an attempt to move substantive due process analysis, for all purposes, toward an exclusively historical methodology—and thereby to debilitate the doctrine. If that were ever *Glucksberg*’s aspiration, *Lawrence* plainly renounced it. As between *Glucksberg* and *Lawrence*, I have little doubt which will prove the more enduring precedent.<sup>45</sup>

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39. *Id.* Despite his claim to defer to the “traditions and conscience of our people” “above all else,” Justice Stevens is actually reluctant to look back to such traditions which, he soon makes clear, are problematic at best: “[F]or we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history . . . .” *Id.* at 3099.

40. *See id.* at 3099–103.

41. *Id.* at 3096–97.

42. *Id.* at 3097.

43. *Washington v. Glucksberg*, 521 U.S. 704 (1997).

44. *Lawrence v. Texas*, 539 U.S. 558 (2003).

45. *McDonald*, 130 S. Ct. at 3097 n.16. On June 28, 2010, the date *McDonald* was decided, the conservative members of the Court adopting the *Glucksberg* test were Chief Justice Roberts and Justices Alito and Scalia. The liberal members of the Court agreeing with Justice Stevens’ endorsement of the *Lawrence* test were Justices Breyer, Ginsberg, and Sotomayor. Justice Thomas contends that fundamental rights are properly analyzed under the Privileges or Immunities Clause. Although Justice Kennedy sided with the conservative plurality in *Glucksberg*, he is the author of the opinion in *Lawrence*, where he adopted the somewhat novel definition of substantive due process liberties from *Casey*:

The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in

Justice Stevens ultimately moves beyond the battle over text and precedent and levels his most telling criticism of the history-based approach of the Court's conservative members. In its simplest formulation, Justice Stevens points out the obvious fact that sometimes Americans have done bad things in the past. Past history, qua history, lacks any discriminating principle to distinguish justice from injustice; it is simply what has gone before. In Justice Stevens's own words, the historical approach to substantive due process:

countenances the most revolting injustices in the name of continuity, for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it effaces this Court's distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes.<sup>46</sup>

In his response to Justice Stevens, Justice Scalia does not attempt to counter or even answer Justice Stevens's criticism of a test that relies on history qua history. He does not do so, one must assume, at least in part, because he cannot deny the logic of Justice Stevens's critique.<sup>47</sup>

Having debunked—on textual and logical grounds—what he refers to as the conservatives' "rigid historical methodology,"<sup>48</sup> Justice Stevens returns to his explication of the meaning of "liberty" in the Fourteenth Amendment. As Justice Stevens has already argued, its meaning is not accessible through metaphysical reason ("abstract philosophy").<sup>49</sup> Consistent with his disclaimer concerning "abstract philosophy" as a source for discerning the universal character of liberty

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making these choices, we stated as follows: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.

*Lawrence*, 539 U.S. at 573–74 (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

46. *McDonald*, 130 S. Ct. at 3099.

47. It must also be noted, however, that Justice Scalia's substantive due process jurisprudence, like much of his jurisprudence in general, is driven by his concern with judicial usurpation. Indeed, his concurrence in *McDonald* is written for the express purpose of countering Justice Stevens ("I write separately only to respond to some aspects of Justice Stevens's dissent," the theory of which he describes as "usurpation" by the judiciary of democratic government. *Id.* at 3050, 3058.). Because Justice Scalia understands it to be the majority's function and responsibility to decide on fundamental rights, he is less concerned with whether his history-based jurisprudence countenances injustice, as Justice Stevens contends. For Justice Scalia, it is largely a matter of respecting the separated powers, as he understands them.

48. *Id.* at 3098.

49. *Id.*

claims, Justice Stevens denies that there exists “any all-purpose, top-down, totalizing theory of ‘liberty.’”<sup>50</sup>

Not only is it the case that no “broad theory of the right or the good” can define liberty’s meaning, we are also to understand, “[t]he Framers did not express a clear understanding of the term to guide us.”<sup>51</sup> Instead, liberty is a “dynamic concept.”<sup>52</sup> As to the meaning of “liberty,” “[as it was] elsewhere explained at some length, was a part of the work assigned to future generations.”<sup>53</sup> Moreover, Justice Stevens approvingly quotes Justice Kennedy to the effect that:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>54</sup>

At this point the reader of Justice Stevens’s opinion might be justifiably perplexed as to where to look for the meaning of “liberty.” After all, Justice Stevens has disclaimed (1) history (except as a “starting point” in Due Process analysis), (2) broad theories or philosophical understandings, and (3) interpretations advanced by the Framers of the Constitution.<sup>55</sup> And yet, rights derived from liberty’s meaning are universal in nature. It is Justice Stevens’s understanding of universality that provides his guide to the perplexed.

Justice Stevens’s conception of “liberty” embraces fundamental rights that are universal, transcending the transitory and idiosyncratic.<sup>56</sup> Moreover, this universality stems from either “a ‘rational

50. *Id.* at 3100.

51. *Id.*

52. *Id.* at 3099. Justice Stevens purposely uses very vague, abstract terms when identifying or justifying those fundamental rights he sees deserving of protection, in order to allow for greater flexibility, greater room, for future Supreme Courts to continue to redefine or expand upon liberty’s “dynamic” quality. *Id.* at 3101. To prepare the way for this process, Justice Stevens must unmoor substantive due process from the bonds of the past, and in particular, from the conservative Justices’ history-based jurisprudence, or any “categorical understanding,” or “all-purpose, top-down, totalizing theory of liberty.” *Id.* at 3100–01. Ultimately, Justice Stevens must leave his definition of “liberty” vague because any attempt to define the term with any precision would undermine *Lawrence v. Texas*’ call to existential freedom: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

53. *McDonald*, 130 S. Ct. at 3099 (quoting John P. Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277, 291 (1986) (internal quotations omitted)).

54. *Lawrence*, 539 U.S. at 578–79.

55. *McDonald*, 130 S. Ct. at 3097 (quoting *Lawrence*, 539 U.S. at 572).

56. *Id.* at 3096.

continuum' of legal precepts<sup>57</sup> . . . or a seamless web of moral commitments . . . ."<sup>58</sup> As noted, we do not find much, if any, discussion of this "seamless web of moral commitments,"<sup>59</sup> but we do find a very great deal of discussion of those legal precepts that Justice Stevens believes represent a "rational continuum." In other words, a certain formulation of *stare decisis* represents the key to unlocking the mystery of the meaning of "liberty." As we will see, Justice Stevens's definition of *stare decisis* has a decidedly forward-looking quality in that the "rational continuum" is one that evolves in a "dynamic" fashion as Americans adapt to an "emerging consensus" involving "especially significant personal interests."<sup>60</sup>

*Stare decisis* as the vehicle for interpreting liberty's meaning, as opposed to the Framers' understanding (particularly any "abstract philosophy" they may have associated with the word), becomes the cornerstone of Justice Stevens's "liberty" jurisprudence. For whatever difficulties may be associated with defining "liberty" in the abstract, its meaning, he claims, can be "refined and delimited."<sup>61</sup> And for Justice Stevens, this is the peculiar province of the Supreme Court.

Indeed, Justice Stevens describes this obligation in a manner that one might plausibly describe as an exercise of will rather than judgment: "We have *insisted* that only certain types of especially significant personal interests may qualify for especially heightened protection."<sup>62</sup> It should be noted that these "especially significant personal interests" do not include property rights: "Ever since 'the deviant economic due process cases [were] repudiated,'<sup>63</sup> . . . our doctrine has steered away from 'laws that touch economic problems . . . .'"<sup>64</sup> Justice Stevens does not find it necessary to inform the reader *from what* these cases deviated.

This process of "refin[ing] and delimit[ing]" the meaning of "liberty" through Supreme Court decisions, Justice Stevens repeats, replaces any theoretical understanding of the word, and he reveals to the reader what the process has produced:

Rather than seek a categorical understanding of the liberty clause, *our precedents* have thus elucidated a conceptual core. The clause safeguards, most basically, "the ability independently to define

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57. *Id.* (quoting *Poe v. Ullman*, 367 U.S. 497, at 543 (1961) (Harlan, J., dissenting)).

58. *Id.*

59. Perhaps Justice Stevens means that the "seamless web of moral commitments" is subsumed by, or to be located within, the "rational continuum of legal precepts."

60. *McDonald*, 130 S. Ct. at 3100.

61. *Id.*

62. *Id.* (emphasis added).

63. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 761 (1997) (Souter, J., concurring in judgment)).

64. *Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

one's identity,"<sup>65</sup> . . . "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny,"<sup>66</sup> . . . and the right to be respected as a human being. Self-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect—these are the central values *we have found* implicit in the concept of ordered liberty.<sup>67</sup>

Justice Stevens, then, distinguishes between a "categorical" understanding of "liberty," which we are to avoid, and a "conceptual" understanding, which we are to embrace. But how are we to identify the "core" of this conceptual understanding in the list he provides? In other words, what unites values such as (1) the right to make important family decisions, (2) the right to be respected as a human being, (3) self-determination, (4) bodily integrity, (5) freedom of conscience, (6) intimate relationships, (7) political equality, (8) dignity, and (9) respect? Logically, all these values can be understood as subsets of the first value he identifies, that is, the core concept of autonomous, existential freedom, or "the ability to define one's identity."<sup>68</sup>

At this point, it is important to recall Justice Stevens's earlier suggestion that the battle for the soul of substantive due process jurisprudence may well come down to whether *Glucksberg* or *Lawrence* triumphs.<sup>69</sup> Justice Stevens clearly endorses *Lawrence*, while rejecting what he considers *Glucksberg*'s excessive reliance on history. The "conceptual core" of the *Lawrence* opinion's definition of liberty is as follows:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>70</sup>

While certain of the "central values" Justice Stevens identifies in the above quotation in *McDonald* are unexceptional ("bodily integrity," "freedom of conscience," and "political equality"), his reference to "the ability independently to define one's identity," suggests a somewhat more radical understanding of liberty than cases prior to *Casey*

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65. *Id.* at 3101 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984)).

66. *Id.* (quoting *Fitzgerald v. Porter Memorial Hosp.*, 523 F.2d 716, 719 (1975)).

67. *Id.* (emphasis added).

68. *Id.* I use the word "existential" because it best captures the meaning of 'defining'—which is in the nature of an act of the will—as opposed to 'understanding' one's identity.

69. *Id.* at 3097.

70. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

and *Lawrence* have advanced. Moreover, the quotation is effectively a restatement, albeit worded slightly differently, of the above quote from *Lawrence*: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>71</sup> For both statements, existential self-definition is the “conceptual core” of the meaning of liberty.

Finally, it is helpful to consider Justice Stevens’s comments concerning core values and how they are tied to the movement of history. This consideration is assisted by an examination of Justice Stevens’s reflections on the nature of the death penalty. In fact, Justice Stevens’s analysis of “liberty” under the Fourteenth Amendment bears considerable resemblance to his analysis of the death penalty as a “cruel and unusual punishment” under the Eighth Amendment. In both cases, Justice Stevens argues that: (1) the Framers did not attempt to provide significant meaning to the constitutional term in question, (2) history contains within it an evolutionary upward trajectory, and (3) that the Supreme Court is the diviner and expositor of that movement:

The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges, who have been guided by the “evolving standards of decency that mark the progress of a maturing society.”<sup>72</sup>

While the well-known “evolving standards of decency that mark the progress of a maturing society” phrase has primarily been limited to Eighth Amendment cases, the evolution of standards and maturation of society referenced by the language clearly applies to Americans’ understanding of societal values generally, and not simply to the death penalty alone. In other words, the “evolving standards of decency” framework of analysis applies to, and is entirely consistent with, Justice Stevens’s understanding of substantive due process as well.

Other opinions by Justice Stevens provide keys to his substantive due process jurisprudence as well. For instance, Justice Stevens also evinces a distrust of the past in his reflections on issues involving homosexuality: “Unfavorable opinions about homosexuals ‘have ancient

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71. *Id.*

72. *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (Warren, C.J.)); *see also* *Atkins v. Virginia*, 536 U.S. 304, 311–12 (“The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”); *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 658 (1992) (“In light of our contemporary understanding of the methods of execution, and in light of less cruel alternatives presently available, I believe that execution by cyanide gas is incompatible with the evolving standards of decency that mark the progress of a maturing society.”) (internal citations omitted).

roots.<sup>73</sup> Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine.<sup>74</sup> Atavism has been defined as something akin to an evolutionary throwback. Thus, in the area of sexual relationships, we also find in Justice Stevens a tendency to equate error with the past, or more particularly, an aspect of the past that has been historically superseded by more evolved standards.

Even traditional distinctions between men and women are subject to Justice Stevens's skepticism concerning opinions of preceding generations: "Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white."<sup>75</sup>

Finally, property rights, Justice Stevens maintains, are also subject to history's evolutionary movement: "Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical."<sup>76</sup>

The idea of evolution in moral consciousness, as interpreted by the Supreme Court, then, forms the core of Justice Stevens's substantive due process jurisprudence. This is evident in the similarity of his analyses, whether the subject be the death penalty, sexual rights, gender distinctions, property rights, or the idea of liberty itself.

#### A. *The Role of the Supreme Court*

A dedication to the current and future generations' values and commitments over past generations, combined with the claim that "[t]he Framers did not express a clear understanding of the term to guide us," leads Justice Stevens to assign to the Supreme Court the duty of discerning those fundamental liberty interests that will result in "greater freedom"<sup>77</sup> for each succeeding generation. In addition to the evident assumption in Justice Stevens's jurisprudence that history is inexorably moving toward ever greater freedom, is the notion that the Court is the prophetic vanguard of that movement: "Although that idea [of liberty] is difficult to define, *the Court has given it meaning* in specific cases and controversies. On the whole, *the Court's deci-*

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73. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 699 (2000) (Stevens, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986)).

74. *Id.*

75. *Mathews v. Lucas*, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting).

76. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1069 (1992) (Stevens, J., dissenting).

77. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3100 (2010).

sions interpreting and reinterpreting the idea of liberty have enlarged the concept.”<sup>78</sup>

At this point, Justice Stevens’s forward-looking theory of *stare decisis* becomes clearer. It does not go back to *Lochner* or the Founding; rather, it begins in the decisive year of 1937 when the Supreme Court’s decision in *West Coast Hotel Co. v. Parrish*<sup>79</sup> repudiated the *Lochner* era. Nineteen thirty-seven is also the year that *Palko* was decided, and Justice Cardozo’s formulation of the substantive due process test in *Palko* provides the beginning point of Justice Stevens’s test. As we have seen, however, it is only the beginning because Justice Stevens has grafted onto Justice Cardozo’s language the test set forth in *Casey* and *Lawrence*. Thus, Justice Stevens’s theory of substantive due process looks to the “rational continuum” that begins in 1937 and continues up through the Court’s more recent decisions in *Casey* and *Lawrence*. In these cases, Justice Stevens indicates, the Court has identified the “evolving notions of decency that mark the progress of a maturing society” and, in particular, those personal rights attaching to each person’s journey toward autonomous self-definition. As history progresses and society continues to evolve and mature, liberty’s “dynamic” conceptual core will come to embrace new forms of self-definition. And it will be the province of the Supreme Court to divine those new forms, and “insist” that they “qualify for especially heightened protection.”

### III. PART TWO: WINDSOR AND THE SECOND WAY TO VIEW “LIBERTY” UNDER THE DUE PROCESS CLAUSE

In *McDonald*, Justice Stevens’s argument was approved by his liberal colleagues on the Court, thereby indicating that his theory of liberty may well become the baseline for determining what are, and what are not, fundamental rights. When rights are determined to be fundamental under the doctrine of substantive due process, of course, state action substantially burdening or eliminating such rights is subject to strict scrutiny review. However, in the recent case of *United States v. Windsor*, the Court did not employ the substantive due process doctrine as the basis for striking down § 3 of the Defense of Marriage Act (DOMA).<sup>80</sup> Instead, in his opinion for the Court, Justice Kennedy employed rational basis review, finding that the legislative purpose and effect behind DOMA was “to disparage and to injure” those

78. John P. Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 33 (1992) (emphasis added).

79. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). The Court in *West Coast Hotel* upheld the state of Washington’s law providing for a minimum-wage to women, even though the Court had struck down a nearly identical law in *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923). The year 1937 is widely recognized as the date when the *Lochner* era ended and substantive due process no longer recognized property and contract rights as fundamental in nature.

80. *United States v. Windsor*, 133 S. Ct. 2675 (2013).



wishing to enter into same-sex marriages, and thus served “no legitimate purpose.”<sup>81</sup> But both Justices Stevens and Kennedy based their arguments on a similar theory of liberty they claim gives meaning to that word as set forth in the Fifth and Fourteenth Amendments’ Due Process Clauses.<sup>82</sup> Thus, despite the similarity in their theoretical accounts of what comprises a constitutionally protected “liberty” interest, Justices Stevens and Kennedy apply different constitutional “tests” when it comes to safeguarding those liberty interests. The result is such that the Court now has more than one constitutional test available to it when it seeks to strike down laws it sees as violating certain liberty interests, but it has accomplished this result by sacrificing jurisprudential clarity and cogency when it comes to understanding the Constitution’s protection of “liberty.”

*United States v. Windsor* involved DOMA, enacted in 1996.<sup>83</sup> DOMA states that under federal law the words “marriage” and “spouse” refer only to legal unions between one man and one woman.<sup>84</sup>

Edith Windsor had been married in 2007 in Toronto, Canada to Thea Clara Spyer.<sup>85</sup> Their marriage was recognized by New York state law.<sup>86</sup> However, Spyer died in 2009, leaving her estate to Windsor.<sup>87</sup> But because their marriage was not recognized by federal law, the government imposed \$363,000 in taxes.<sup>88</sup> Had their marriage been recognized, the estate would have qualified for a marital exemption, and no taxes would have been imposed.<sup>89</sup> On November 9, 2010, Edith Windsor filed suit in district court seeking a declaration that DOMA violated the equal protection principles incorporated in the Fifth Amendment.<sup>90</sup> The district court ruled for Windsor and against the United States, holding § 3 of DOMA to be unconstitutional.<sup>91</sup> The Second Circuit Court of Appeals affirmed the district court’s rul-

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81. *Id.* at 2696.

82. In *Lawrence*, Justice Kennedy explicitly confirmed his agreement with Justice Stevens’s dissent in *Bowers*: “Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and should control here.” *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003). Moreover, Justice Kennedy quotes at length from the *Bowers*’s dissent in which Justice Stevens argues that homosexual activity was a form of “liberty” protected by the Fourteenth Amendment’s Due Process Clause. *Id.* Notably, Justice Stevens goes on to cite a line of what he considers to be Substantive Due Process cases: *Griswold v. Connecticut*, 381 U.S. 479 (1965) (This protection extends to intimate choices by unmarried as well as married persons); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

83. *See generally Windsor*, 133 S. Ct. at 2682.

84. *Id.* at 2683.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See id.*

90. *Id.*

91. *Id.* at 2682.

ing by applying heightened scrutiny to DOMA's classifications based on sexual orientation.<sup>92</sup>

Justice Kennedy wrote the majority opinion in *Windsor*.<sup>93</sup> He was joined by those considered to be the more liberal members of the Court to form a five-person majority.<sup>94</sup> As this Article will argue, Justice Kennedy has expanded the tests the Court may now employ in evaluating liberty interests, but has done so at the expense of jurisprudential clarity.

Justice Kennedy takes up the liberty interest argument in Part Three of his opinion for the Court.<sup>95</sup> He begins with an account of opinions of Americans concerning same-sex marriages by contrasting the past with the present.<sup>96</sup> In the past, many Americans "had not even considered the possibility" of same-sex marriage.<sup>97</sup> But the times are changing, and to many present-day Americans "came the beginnings of a new perspective, a new insight."<sup>98</sup> This new insight concerns the validity of marriage for those "same-sex couples who wish to *define themselves* by their commitment to each other."<sup>99</sup> Justice Kennedy recounts how New York, "in common with, as of this writing, 11 other States and the District of Columbia" has passed laws legalizing same-sex marriages.<sup>100</sup> According to Justice Kennedy, then, that which heretofore had not received the benefit of reflection is now emerging as an insight into the new "liberty" paradigm of self-definition.<sup>101</sup>

It is "[a]gainst this background of lawful same-sex marriage in some States, [that] the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution."<sup>102</sup> In short, the background in question is one in which present and future insights are replacing the lack of reflection that characterizes the past.

Justice Kennedy spends the next seven paragraphs of his opinion discussing the federalism concerns implicated in the marriage question. He points out how the role of the federal government has traditionally been quite limited in the area of laws affecting the marriage relationship, whereas "the definition and regulation of marriage . . . has been treated as being within the authority and realm of the sepa-

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92. *Id.* at 2684.

93. *See generally id.*

94. Specifically, Justice Kennedy was joined by Justices Breyer, Ginsberg, Sotomayor, and Kagen. The four more conservative members of the Court dissented; specifically, Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

95. *Windsor*, 133 S. Ct. at 2689.

96. *See id.* at 2689–90.

97. *Id.* at 2689.

98. *Id.*

99. *Id.* (emphasis added).

100. *Id.*

101. *Id.*

102. *Id.*

rate States.”<sup>103</sup> Despite his spilling a considerable amount of ink on the federalism question, Justice Kennedy ultimately—and somewhat surprisingly—rejects federalism as the appropriate constitutional grounds for overturning § 3 of DOMA.<sup>104</sup>

In fact, it is “unnecessary to decide” the federalism question because the inquiry into deprivation of a constitutionally protected liberty interest takes precedence.<sup>105</sup> Specifically, the Court must “address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment.”<sup>106</sup> Justice Kennedy’s extended discussion of how federalism principles support state over federal authority (when it comes to regulating marriage) is merely a means by which he hopes to provide additional evidence to support his argument that DOMA’s departure from those principles represents “[d]iscriminations of an unusual character.”<sup>107</sup> In other words, this departure is but one piece of the puzzle that Justice Kennedy will present to reveal an irrational (and hence unconstitutional) intent to harm a particular group.<sup>108</sup>

The cases Justice Kennedy cites in support of his “[d]iscrimination[s] of an unusual character” principle are two equal protection cases: *Romer v. Evans* and *Louisville Gas & Elec. Co.*<sup>109</sup> At this point in the opinion, it would be reasonable to assume that *Windsor* will be decided on equal protection grounds. But there is no clear statement to that effect, although Justice Kennedy does cite to *Bolling v. Sharpe* at a later point in his opinion.<sup>110</sup> By way of contrast, in his ruling in *Romer*, Justice Kennedy was quite explicit in finding an equal protection violation in Colorado’s law limiting homosexual rights: “Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.”<sup>111</sup> Unlike the clarity that he provided in *Romer*, however, Justice Kennedy directs the reader to the “liberty” interest he believes is violated by Section 3 of DOMA.<sup>112</sup>

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103. *Id.* at 2689–90.

104. *See id.* at 2695–96.

105. *Id.* at 2692.

106. *Id.*

107. *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

108. In his dissent, Justice Scalia notes Justice Kennedy’s discussion of federalism principles and wonders at his colleague’s purpose in giving the topic such an extensive treatment, particularly when Justice Kennedy quickly disclaims reliance on those principles for purposes of the decision: “But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is?” *Id.* at 2705 (Scalia, J., dissenting).

109. *Id.* at 2692 (citing *Romer v. Evans*, 517 U.S. 620 (1996); *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928)).

110. *Bolling v. Sharpe*, 347 U.S. 497 (1954). *Bolling* has been interpreted as the case in which the Court found equal protection principles implicit in the Fifth Amendment’s Due Process Clause.

111. *Romer*, 517 U.S. at 635–36.

112. *Windsor*, 133 S. Ct. at 2681.

Moreover, Justice Kennedy goes further and supplies meaning to the “liberty” interest—same-sex marriage—at issue in this case, as that interest comprises, at least in part, the “initiative of those who [sought] a voice in shaping the destiny of their own times.”<sup>113</sup> *Lawrence v. Texas*, Justice Kennedy informs us in *Windsor*, also supplies meaning to the “liberty” interest in question: “Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form ‘but one element in a personal bond that is more enduring.’”<sup>114</sup>

Such a “liberty” interest clearly implicates more than equal protection analysis alone, for a law (such as Texas’ law) that punishes homosexual sex was deemed unconstitutional on substantive grounds.<sup>115</sup> But Justice Kennedy concludes Part Three of his *Windsor* opinion stating that the *intimacy* of relationships, so central to the reasoning in *Lawrence*, reflects both “the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.”<sup>116</sup> At this point it is unclear what constitutional doctrine Justice Kennedy is invoking, except that it in some manner involves “liberty” interests similar to those usually analyzed under substantive due process, equal protection interests, and understandings of both liberty and equality that are part of an evolving American understanding.<sup>117</sup>

Part Four of Justice Kennedy’s opinion in *Windsor* addresses the *purpose and effect* of DOMA, and he finds the law to fail both prongs of the test.<sup>118</sup> Not only was DOMA passed with the purpose of harming those seeking same-sex marriages, but its effect did harm that group by denying them equal financial and social status.<sup>119</sup> Justice Kennedy’s analysis of DOMA’s purpose and effect might be understood simply as an equal protection analysis, as he primarily references the intent to create an *unequal* playing field, as well as the *unequal* effects that do in fact result.<sup>120</sup> Moreover, Justice Kennedy

113. *Id.* at 2692 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2359 (2011)).

114. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

115. And, in fact, *Lawrence v. Texas* is *not* an Equal Protection Clause case.

116. *Windsor*, 133 S. Ct. at 2692–93.

117. As will be discussed, the dissents of Justices Scalia and Alito also find Justice Kennedy’s arguments unclear at best. Justice Scalia bemoans “how rootless and shifting its justifications are.” *Id.* at 2705 (Scalia, J., dissenting). Justice Alito notes that the majority opinion is “related” to “equal protection principles,” but also that “substantive due process may partially underlie the Court’s decision today.” *Id.* at 2714 (Alito, J., dissenting).

118. *See generally id.* at 2693.

119. *Id.* at 2693–95.

120. “The Act’s demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law.” *Id.* at 2693–94. “DOMA writes inequality into the entire United States Code.” *Id.* at 2694. “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality.” *Id.*

again cites to the equal protection cases of *Romer*, *Moreno*, and *Bolling v. Sharpe*.<sup>121</sup> But this initial understanding does not hold up. Just as it appeared that Justice Kennedy was invoking “liberty” interests similar to those usually analyzed under substantive due process in Part Three of his opinion, here in Part Four, Justice Kennedy begins with the following statement: “DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.”<sup>122</sup> Had Justice Kennedy meant to invoke equal protection alone, he would have said something like, “By doing so it violates the equal protection principle this Court has found to be an implicit part of the Fifth Amendment’s Due Process Clause.”<sup>123</sup>

Moreover, Justice Kennedy restates his reliance on *Lawrence* here in Part Four, thereby reaffirming the distinct, constitutionally based liberty interest he sees at play.<sup>124</sup> If there were any doubt in the *Windsor* opinion that Justice Kennedy intends to provide constitutional protection for the kind of liberty interests he advances, his argument in *Lawrence* put all such doubt to rest:

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.<sup>125</sup>

Like the right to same-sex sexual activity, same-sex marriage is “protected by the substantive guarantee of liberty”; that is, by some formulation of Substantive Due Process.<sup>126</sup>

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121. *See id.* at 2689.

122. *Id.* at 2693 (emphasis added).

123. By speaking in the plural, Justice Kennedy clearly points to the liberty interest he has been discussing, as well as the more obvious equal protection principle he invokes.

124. *Windsor*, 133 S. Ct. at 2709.

125. *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003).

126. *Id.* at 575. Although the doctrine of substantive due process is generally associated with the Fourteenth Amendment (which Amendment was invoked in *Lawrence* to strike down the Texas anti-sodomy law), Justice Kennedy does not appear to treat the “liberty” interests protected by the Fifth Amendment any differently.

Finally, Justice Kennedy finds considerable evidence of a purpose to injure “the equal dignity of same-sex marriages”<sup>127</sup> in the House of Representatives’ Report’s references to the “moral” underpinnings of DOMA’s defense of traditional marriage.<sup>128</sup> But how can Justice Kennedy equate moral disapproval with a purpose to “disparage and to injure,”<sup>129</sup> especially given the fact that, as Justice Scalia notes in his dissent: “[T]he Constitution does not forbid the government to enforce traditional moral and sexual norms.<sup>130</sup> I will not swell the U.S. Reports with restatements of that point.”<sup>131</sup> Notably, Justice Kennedy never takes issue with the claim that the Constitution does not forbid the government to legislate on morals. Nor does it appear that Justice Scalia’s charge goes to the heart of Justice Kennedy’s argument. For Justice Kennedy, it is not legislation regarding morals, *per se*, rather it is those moral understandings of the past that are ignorant because they are blind to new “insights.” In other words, only those moral claims that are not part of the “evolving understanding of the meaning of equality” (or liberty) that qualify as intending to “disparage and to injure.”

Justice Kennedy’s disparagement of natural rights discussed earlier now comes into better focus. Justice Kennedy’s rejection of natural rights is necessary for the successful realization of a community of fellow citizens defining their own concepts of existence, because the resulting self-definitions are, inherently, radically autonomous. Natural rights mean natural limits and the consequent disapproval of those decisions (self-definitions) that reject or ignore those limits. Thus moral disapproval that is based on any such antiquated understanding must be characterized as animus, not only because society has matured beyond this understanding, but because, on a practical level, such disapproval will undermine a peaceful, harmonious citizenry. Put differently, moral disapproval is necessarily, and must necessarily, be characterized as animus.

Returning to the question asked earlier, how is Justice Kennedy’s due process defense of “liberty” consistent with, or a departure from Justice Stevens’s theory of “liberty” under substantive due process analysis? It will be evident that Justices Stevens and Kennedy have very similar theoretical accounts of what comprise constitutionally protected “liberty” interests. Despite this similarity, however, Justices Stevens and Kennedy apply different constitutional “tests” when it

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127. *Windsor*, 133 S. Ct. at 2693–95.

128. The House concluded that DOMA expresses “both *moral* disapproval of homosexuality, and a *moral* conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.” *Id.* at 2693. The stated purpose of the law was to promote an “interest in protecting the traditional *moral* teachings reflected in heterosexual-only marriage laws.” *Id.* (emphasis added).

129. *Id.* at 2696.

130. *Id.* at 2707; see *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

131. *Windsor*, 133 S. Ct. at 2707.

comes to safeguarding those liberty interests. But are these tests consistent with one another? This Article argues that the tests are consistent with one another and offers distinct but complimentary ways to analyze the liberty interests in question.<sup>132</sup>

The theory of “liberty” interests that the liberal side of the Court—led by Justices Stevens and Kennedy—is willing to defend, it appears, has two tracks. The first track involves those liberty interests the liberal members are willing to characterize as fundamental. These interests will receive strict scrutiny protection. The second track involves those liberty interests the liberal members are interested in protecting, but unwilling to characterize as fundamental—such as same-sex (sexual and marital) relationships. These interests will receive rational basis protection, and generally be struck down on the basis of what the Court characterizes as animus toward the interests in question.

But even though the Court decides to assign the liberty interest in question to one track or another, the liberty interest itself will be analyzed in a similar fashion either way. In either case, the liberty interest will receive constitutional protection—via strict scrutiny or rational basis—if it can be said to have the following characteristics: (1) it can be described as conforming to the paradigm of existential self-definition; (2) it is considered part of the continuing evolution in moral consciousness, as opposed to past misconceptions. In this regard, morality remains a legitimate legislative interest, as long as the law in question conforms to the post-1937 rational continuum that captures the “evolving standards of decency that mark the progress of a maturing society.” Thus morality, and the morals’ legislation, becomes co-extensive with “liberty,” which is understood as autonomous self-definition. No law that indicates intolerance with this new paradigm will survive the Court’s new Due Process tests. And critical to the jurisprudential process is the recognition that it is the unique responsibility of the Supreme Court to recognize and identify those liberty interests that it believes fall within this “rational continuum” that represents the correct decisions of the Court.

#### IV. PART THREE: THE CONSERVATIVES’ DEEPLY ROOTED RESPONSE

In his plurality opinion in *McDonald*, Justice Alito adheres to the Court’s reliance on the Fourteenth Amendment’s Due Process Clause as the locus for fundamental rights jurisprudence (“substantive due process”).<sup>133</sup> He concludes that the Due Process Clause protects the Second Amendment as a fundamental right against state infringe-

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132. Justice Stevens, after all, fully endorsed Justice Kennedy’s opinion in *Lawrence*, which opinion did not employ a substantive due process analysis, but rather a rational basis analysis similar to the one employed in *Windsor*.

133. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026–50 (plurality opinion).

ment.<sup>134</sup> Justice Alito relies on the Due Process Clause even though he does not attempt to defend it on the basis of the text of the Constitution.<sup>135</sup> Instead, he relies on the test that emerged from *Duncan v. Louisiana*<sup>136</sup> and *Washington v. Glucksberg*.<sup>137</sup> Consistent with these two cases, as Justice Alito contends, the test is whether a right is “fundamental to *our* scheme of ordered liberty” or “deeply rooted in this Nation’s history and tradition.”<sup>138</sup>

Justice Alito’s reliance upon rights that are “fundamental to *our* scheme of ordered liberty” or “deeply rooted in this Nation’s history and tradition” continues the substantive due process jurisprudence that conservative members of the Court have come to embrace in recent decades.<sup>139</sup>

In his concurrence in *McDonald*—a concurrence directed at rebutting Justice Stevens’s theory of substantive due process—Justice Scalia repeated the same “history and tradition” test. This is the test the conservative members of the Court consider appropriate when analyzing substantive due process issues.

History and tradition, and not any reference to higher law principles or evolving moral norms, have become the sources for identifying fundamental rights. As Justice Scalia contends, only a jurisprudence grounded in the deeply rooted traditions of the past can be faithful to the democratic form of government in which the people, rather than the Supreme Court, decide the fundamental moral issues confronting the nation.<sup>140</sup> Unless and until the people speak—whether the issue is abortion or same-sex marriage—the Court’s role is one of interpretation of what has been decided in the past.<sup>141</sup> Moreover, and just as importantly to Justice Scalia’s mind, any other jurisprudential approach (particularly when it involves the kind of issues that are involved in substantive due process analysis) only invites a form of judicial tyranny.<sup>142</sup>

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134. *Id.* at 3030–31.

135. *See id.* at 3031–32.

136. *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

137. *Washington v. Glucksberg*, 521 U.S. 704 (1997).

138. *McDonald*, 130 S. Ct. at 3036.

139. *Id.*; *see, e.g., Glucksberg*, 521 U.S. at 720–21; *Bowers v. Hardwick*, 478 U.S. 186, 191–94 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Palko v. Connecticut*, 302 U.S. 319, 325–27 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

140. *United States v. Windsor*, 133 S. Ct. 2675, 2705–07 (2013).

141. *Id.* at 2698–99.

142. *Id.* at 2699.



V. PART FOUR: THE THEORETICAL UNDERPINNINGS OF JUSTICES STEVENS'S AND KENNEDY'S UNDERSTANDINGS OF CONSTITUTIONALLY PROTECTED LIBERTY INTERESTS

It is a tricky matter to try and discern the philosophic underpinnings of a Supreme Court Justice. After all, Justices are lawyers, not philosophers. But it is clear that certain dominant ideas characterize the decidedly different theories of substantive due process that divide the liberal and conservative sides of the Court. Moreover, the process of distinguishing fundamental from non-fundamental rights that substantive due process requires necessarily involves theoretical analysis and arriving at theoretical propositions. We see this in the Justices' opinions, and their analyses and propositional statements that form the bases of their dominant ideas, which invite one to consider what they may be based on at a deeper, albeit generally unspoken, level. It is the argument of this Article that the ideas advanced by Justices Stevens and Kennedy—in their attempts to define those liberty interests deserving of constitutional protection—reveal a substantial kinship to the theory of Progressivism. It is, after all, the advent of Progressivist theory that effectively attacked and largely defeated the natural rights philosophy of the Founders, ushering in a new understanding of law, politics, and the Constitution itself.

What is Progressivism, and how influential in shaping American thought has it been? Increasingly, scholars are seeking answers to this question.<sup>143</sup> As a general matter, Progressivism was a movement responding to the serious social changes brought by the Industrial Revolution in the late nineteenth century, and the idea that progress was being retarded by laissez-faire capitalism that resulted in significant economic inequality between the rich and the poor.<sup>144</sup> Professor Edward A. Purcell, Jr. provides a concise account of Progressivism's political agenda as:

[a] broader and more diverse movement aimed at controlling corporations, rationalizing social and economic institutions, ameliorating the harsh consequences of industrialism, utilizing science and expert knowledge for democratic ends, and, in the name of "the people," taking control of government from political "bosses" and "special interests."<sup>145</sup>

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143. See, e.g., AMERICAN PROGRESSIVISM (Ronald J. Pestritto & William J. Atto eds., 2008); CHALLENGES TO THE AMERICAN FOUNDING: SLAVERY, HISTORICISM, AND PROGRESSIVISM IN THE NINETEENTH CENTURY (Ronald J. Pestritto & Thomas G. West eds., 2005); BRADLEY C.S. WATSON, LIVING CONSTITUTION, DYING FAITH: PROGRESSIVISM AND THE NEW SCIENCE OF JURISPRUDENCE (ISI Books, 2009); EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION (Yale Univ. 2000); RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (Cato Inst. 2006).

144. WALTER NUGENT, PROGRESSIVISM: A VERY SHORT INTRODUCTION 2 (Oxford Univ. Press 2010).

145. PURCELL, *supra* note 143, at 11–12.

On a deeper, philosophical level, Professors Ronald Pestritto and William Atto describe Progressivism's core principles, as follows:

Whereas the [F]ounders had posited what they held to be a permanent understanding of just government, based upon a permanent account of human nature, the [P]rogressives countered that the ends and scope of government were to be defined anew in each historical epoch. They couple this perspective of historical contingency with a deep faith in historical progress . . . .<sup>146</sup>

Human nature, in other words, lacks permanent characteristics; instead, in significant respects human nature is subject to historical change or evolution. Moreover, change is for the good; it is progressive in nature. The Founders' understanding that there exists a "permanent account of human nature"—from which "natural rights" are derived—is at odds with this new insight into progressive historical change. As we shall see, the Progressives not only considered the Founders' understanding to be misguided, but also to be an obstacle to the new science of law and politics that is based on the new insights into the nature of historical change.

As this Author has argued elsewhere, there "is a growing scholarly recognition that natural law and natural rights did, in fact, form the theoretical basis for the political philosophy of the Founding Fathers."<sup>147</sup> A brief examination of a few of the Founders' most prominent references to natural law and natural rights should prove illustrative of this point as well as provide an appreciation of how they viewed the connection between natural rights and the Constitution. Moreover, such an examination is helpful as a background for appreciating what Progressivism sought to replace.

As the author of the Declaration of Independence, Thomas Jefferson wrote that in declaring independence from Great Britain, the American Revolutionaries appealed to the "Laws of Nature and of Nature's God," noting that human beings are "endowed by their Creator" with certain "unalienable Rights."<sup>148</sup> Jefferson's reference to natural law and natural ("unalienable") rights demonstrates the connection between the two: natural rights are derived from natural law. Jefferson's statements in the Declaration of Independence reveal that natural rights are those particular claims—assertions of principle—that form the basis upon which a just government is established, and that limit government authority. A truly just form of government, therefore, is one which seeks "to secure these rights," which is why "[g]overnments are instituted among Men."<sup>149</sup> Moreover, the government's failure to secure mankind's fundamental natural rights, gives

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146. AMERICAN PROGRESSIVISM, *supra* note 143, at 3.

147. Broyles, *Doubting Thomas*, *supra* note 8, at 346. A more complete discussion of the Founders' understanding of natural rights is provided in this article.

148. THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

149. *Id.* para. 2.

rise to the right to revolution—“the Right of the People to alter or to abolish it.”<sup>150</sup> Jefferson, moreover, believed that all Americans seeking to break away from Great Britain shared a common dedication to the Declaration’s principles:

All American Whigs thought alike on these subjects. When forced, therefore, to resort to arms for redress, an appeal to the tribunal of the world was deemed proper for our justification. This was the object of the Declaration of Independence. Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent . . . . Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind . . . . All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.<sup>151</sup>

Jefferson later reaffirmed his personal dedication to natural rights as central to republican government stating that “[e]very species of government has its specific principles. Ours perhaps are more peculiar than those of any other in the universe. It is a composition of the freest principles of the English constitution, with others derived from natural right and natural reason.”<sup>152</sup> Unlike Progressivism, Jefferson did not believe that natural rights were contingent upon discrete historical periods, or changing human mores.<sup>153</sup> For him, “Nothing then is unchangeable but the inherent and unalienable rights of man.”<sup>154</sup>

John Adams likewise made clear that the principles of the American Revolution “are the principles of Aristotle and Plato, of Livy and Cicero, and Sidney, Harrington, and Locke; the principles of nature and eternal reason; the principles on which the whole government over us now stands.”<sup>155</sup> Adams and Jefferson even agreed on the pri-

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150. *Id.*

151. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in 16 THE WRITINGS OF THOMAS JEFFERSON 117, 118–19 (Library ed. 1904) [hereinafter WRITINGS OF THOMAS JEFFERSON].

152. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 93 (New ed. 1853).

153. See Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824), in 16 WRITINGS OF THOMAS JEFFERSON, *supra* note 151, at 42, 45–48.

154. *Id.* at 48.

155. John Adams, *Novanglus: Addressed to the Inhabitants on the Colony of Massachusetts Bay, No. 1*, in THE POLITICAL WRITINGS OF JOHN ADAMS 26–27 (George W. Carey ed., 2000); see also THE FOUNDERS ON RELIGION 132 (James H. Hutson ed., 2005) (“To him who believes in the Existence and Attributes physical and moral of a God, there can be no obscurity or perplexity in defining the Law of Nature to be his wise benign and all powerful Will, discovered by Reason. A Man who disbelieves the Being of a God, will have no perplexity or obscurity in defining Morality or the Law of Nature, natural Law, natural Right or any such Things to be mere Maxims of Convenience, to be Swifts pair of Breeches to be put on upon occasion for Decency or

mary philosophic authorities for natural law and natural right principles, with both men referencing Aristotle, Cicero, Locke, and Sidney.<sup>156</sup>

In his discussion of constitutional powers in Federalist Number 43, James Madison, the Father of the Constitution, made reference to the Declaration's invocation of natural law: "[T]o the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed."<sup>157</sup>

Alexander Hamilton was equally clear about his dedication to natural law principles in his debate with the Tory sympathizer, Samuel Seabury: "[N]atural liberty is a gift of the beneficent Creator . . . . *Civil liberty is only natural liberty, modified and secured by the sanctions of civil society.*"<sup>158</sup> Like Jefferson, Madison, and Adams, Hamilton emphasized the central place natural rights must enjoy in a just regime of liberty:

The principal aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute rights* of individuals.<sup>159</sup>

Finally, Hamilton made it clear that natural rights require positive laws in order to "be preserved," but that such rights pre-exist any such positive laws: "The sacred rights of mankind are not to be rummaged for among *old parchments or musty records*. They are written, as with a sunbeam, in the whole volume of human nature, by the Hand of the Divinity itself, and can never be erased or obscured by mortal power."<sup>160</sup>

Although Adams and Hamilton—as federalists—were keen political opponents of Jefferson and Madison—who helped create the opposition democratic-republican party—they were all united in their dedications to an understanding of man, positive law, and government that was grounded in natural rights. In Jefferson's words, "All Ameri-

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Conveniency and to be put off at pleasure for either.") (footnote omitted) (quoting Letter from John Adams to Thomas Boylston Adams (Mar. 19, 1794)).

156. Adams adds Plato and Harrington to the list. John Adams, *Novanglus*, *supra* note 155, at 26–27.

157. THE FEDERALIST NO. 43, at 269 (James Madison) (Clinton Rossiter ed., 1961).

158. ALEXANDER HAMILTON, THE FARMER REFUTED (1775), *reprinted in* 1 THE WORKS OF ALEXANDER HAMILTON IN TWELVE VOLUMES 53, 87 (Henry Cabot Lodge ed., Fed. ed. 1904).

159. *Id.* at 63–64 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 120 (1765)).

160. *Id.* at 113 (emphasis added).

can Whigs thought alike on these subjects.” It is this common understanding that came under attack with the advent of Progressivism.

A. *The Progressive Critique and the Demise of Natural Rights*

Progressive-era thinkers at the turn of the twentieth century mounted a powerful and direct critique of the Founders’ natural rights understanding of the first principles of government. Noted scholars and politicians came to embrace Progressivist theory and its concomitant rejection of the Founders’ natural rights philosophy.<sup>161</sup> As Professor Thomas G. West observes, “The Progressives repeatedly repudiated natural rights and natural-law as unjust, ignoble, and untrue.”<sup>162</sup>

Writing in 1903, the influential professor Charles Edward Merriam, who was an advisor to several U.S. Presidents, observed with approval that the Founders’ understanding of natural rights was in a state of severe decline: “The present tendency . . . in American political theory is to disregard the once dominant ideas of natural rights and the social contract . . . rights are considered to have their source not in nature, but in law.”<sup>163</sup> Merriam contended that this decline had reached the state of terminal illness, stating that the “natural law and natural rights” of the Founders had been discarded by intellectuals “with practical unanimity.”<sup>164</sup> Noted scholar John Dewey debunked the natural rights thinking of the Founding generation as follows: “Natural rights and natural liberties exist only in the kingdom of mythological social zoölogy.”<sup>165</sup> The first president of the American Political Science Association, Frank Johnson Goodnow, also contended that the Founders’ understanding was an outdated relic because it predated “the theory of evolutionary development.”<sup>166</sup> As these comments indicate, Progressivist scholars believed that the Founders’ understanding of natural rights had been superseded by more advanced theories of social organization, theories grounded in positivism and evolution.<sup>167</sup> This Progressivist scholarship and politics eventually made its way into the jurisprudence of Supreme Court justices.

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161. See, e.g., AMERICAN PROGRESSIVISM, *supra* note 143; CHALLENGES TO THE AMERICAN FOUNDING: SLAVERY, HISTORICISM, AND PROGRESSIVISM IN THE NINETEENTH CENTURY, *supra* note 143.

162. Thomas G. West, *The Universal Principles of the American Founding*, in THE AMERICAN FOUNDING: ITS INTELLECTUAL AND MORAL FRAMEWORK 53, 64 (Daniel N. Robinson & Richard N. Williams eds., 2012).

163. C. EDWARD MERRIAM, A HISTORY OF AMERICAN POLITICAL THEORIES 311 (1903).

164. *Id.* at 308–09.

165. JOHN DEWEY, LIBERALISM & SOCIAL ACTION 17 (Capricorn Books 1963) (1935).

166. Frank J. Goodnow, *The American Conception of Liberty*, in AMERICAN PROGRESSIVISM, *supra* note 143, at 62.

167. For a more complete account of the thought of leading Progressivists, from scholars to politicians, see generally AMERICAN PROGRESSIVISM, *supra* note 143.

B. *Progressivism and the High Court*

Supreme Court Justices write legal opinions, not philosophical tracts or treatises. With this said, there is little doubt that one finds in these opinions a consistent theoretical orientation. Indeed, a common observation, not to mention frequent complaint, is that the conservative and liberal members of the Court split their votes in a relatively consistent and predictable fashion, particularly when it comes to moral and social issues. As will be discussed, many of the foundational presuppositions underlying the opinions of the liberal members of the Court—and Justices Stevens and Kennedy, in particular—can be traced to Progressivist theory. And while the conservative members of the Court have not embraced Progressivist theory to the degree that the liberal members have, the conservatives have generally rejected the natural rights understanding of the Founders as well, only to replace it with a different form of history-based jurisprudence.<sup>168</sup> As we have seen in the quotes from the prominent Progressivist thinkers, discussed above, a rejection of natural rights was a cornerstone of Progressivist thought.

A useful place to begin consideration of the Supreme Court's abandonment of the philosophy of the Founders is to compare the divergent understandings of the common law of Alexander Hamilton and Justice Oliver Wendell Holmes, respectively. Alexander Hamilton, of course, was not only one of the preeminent Founders but an accomplished lawyer as well. He located "the great body of the common law" in "[n]atural law and natural reason applied to the purposes of society."<sup>169</sup> Justice Holmes, on the other hand, ridiculed this close association between natural law and the common law: "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact."<sup>170</sup> In fact, Holmes's contempt for the idea of natural law could be quite explicit: "The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something

168. In fact, this Author knows of *no* Supreme Court Justice in the last one hundred years or more who has spoken approvingly of a natural rights jurisprudence, with the possible exception of Justice Clarence Thomas. But even Justice Thomas is reticent to invoke natural rights in his opinions. See Broyles, *Doubting Thomas*, *supra* note 8, at 344.

169. Alexander Hamilton, *Speech in the Case of Harry Crosswell*, in 8 THE WORKS OF ALEXANDER HAMILTON IN TWELVE VOLUMES, *supra* note 158, at 387, 421.

170. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), *superseded by statute*, Longshore and Harbor Workers' Compensation Act, Pub. L. No. 92-576, 86 Stat. 1251, 1265 (1972) (codified as amended at 33 U.S.C. § 903 (2006)), *as recognized in* *Dir. Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297 (1983).

that must be accepted by all men everywhere.”<sup>171</sup> In private correspondence, Holmes was even more forceful: “All my life I have sneered at the natural rights of man . . . .”<sup>172</sup> By associating the common law with the voice of the political sovereign, as opposed to natural rights, Justice Holmes made clear that positive law—or more generally, positivism—is the only real basis for law. Like ghosts, “brooding omnipresence[s]” are no longer believed in.<sup>173</sup>

In 1939, Justice Owen Roberts noted that those jurists who Justice Holmes considered to possess “that naïve state of mind” which they shared with the Founders had disappeared from the Court, at least to any meaningful extent:

At one time it was thought that [the Privileges and Immunities Clause] recognized a group of rights which, *according to the jurisprudence of the day*, were classed as “natural rights”; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State.<sup>174</sup>

It is worth noting that Justice Roberts associated natural rights with “the jurisprudence of the day,” thereby signaling the extent to which the Founders’ understanding had at one time been adopted by the judicial branch.

While this Article is primarily concerned with the theoretical underpinnings of Justices Stevens’s and Kennedy’s due process jurisprudence, several other examples of prominent Justices rejecting natural rights help demonstrate the High Court’s overall abandonment of the Founders’ understanding. Indeed, Justice Holmes was influential to these later Justices who came to adopt his argument. Justice William O. Douglas, the author of the majority opinion in the famous modern substantive due process case, *Griswold v. Connecticut*,<sup>175</sup> embraced Justice Holmes’s disparagement of natural law:

We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment “does not enact Mr. Herbert Spencer’s Social Statics.” Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.<sup>176</sup>

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171. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

172. Letter from Oliver Wendell Holmes to Harold Laski (Sept. 15, 1916), in 1 HOLMES-LASKI LETTERS 21 (Mark DeWolfe Howe ed., 1953).

173. See generally LIVING CONSTITUTION, *supra* note 143, at 130–47.

174. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 511 (1939) (emphasis added).

175. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

176. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966) (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905)).

Justice Hugo Black was even more straight-forward:

[T]he “natural law” formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.<sup>177</sup>

In turning to Justices Stevens and Kennedy, I have found no express criticism of natural rights by the former. Justice Kennedy, however, has been more forthcoming. In writing the opinion in a case involving the Eleventh Amendment, Justice Kennedy suggested that neither the Constitution itself, nor the Founders’ understanding of the Constitution, is connected with natural law:

Despite the dissent’s assertion to the contrary, the fact that a right is not defeasible by statute means only that it is protected by the Constitution, not that it derives from natural law . . . . By the same token, the contours of sovereign immunity are determined by the Founders’ understanding, not by the principles or limitations derived from natural law.<sup>178</sup>

Not only did Justice Kennedy find natural law principles irrelevant to constitutional analysis, he also found the dissent’s attempt to associate his reasoning with such principles to be in the nature of a smear campaign: “In an apparent attempt to disparage a conclusion with which it disagrees, the dissent attributes our reasoning to natural law.”<sup>179</sup> Justice Kennedy, then, is consistent with modern-day jurists who overwhelmingly reject natural rights. As Bradley Watson observes, “The modern era justices . . . deny in principle the existence of natural standards, or the authority of the Constitution as it was written. The earlier justices look back; the modern justices look forward.”<sup>180</sup>

But Progressivist theory, and the justices who came to embrace it, not only rejected what it considered the time-bound understanding of natural law and natural rights of the founding generation, it replaced that understanding with what was considered a new insight into the historically contingent nature of things: an insight that “couple[d] this perspective of historical contingency with a deep faith in historical progress.”<sup>181</sup> Bradley Watson argues that Justices Louis Brandeis and Benjamin Cardozo join Justice Holmes as the “three jurists [who] en-

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177. *Adamson v. California*, 332 U.S. 46, 75 (1947) (Black, J., dissenting), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964).

178. *Alden v. Maine*, 527 U.S. 706, 734 (1999).

179. *Id.* at 758.

180. *LIVING CONSTITUTION*, *supra* note 143, at 115.

181. *AMERICAN PROGRESSIVISM*, *supra* note 143, at 3.



capsulate the essence of Progressivism as legal theory in the most comprehensive and telling manner.”<sup>182</sup>

Whereas Thomas Jefferson had famously declared in the Declaration of Independence that certain truths are “self-evident,” Justice Holmes denied the existence of any such truths.<sup>183</sup> Rather than relying on self-evident truths or propositions, Justice Holmes contended that judges largely decide matters based on the opinions of the day, although those opinions and the resultant decisions change with the times.<sup>184</sup> Judges make decisions:

Because of some belief as to the practice of the community or of a class, or because of some opinion as to policy . . . . Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place . . . . [O]ur law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident . . . .<sup>185</sup>

Historically contingent preferences, not legal principles, are the ultimate drivers of legal decisions. History, for Progressives, has replaced a reliance on natural law principles and the self-evident truths statesmen and jurists can glean therefrom.

Turning then to Justices Stevens and Kennedy: What, if anything, do we discern in their opinions that leads to the conclusion that Progressivism’s tenets play a decisive role in their respective jurisprudences, and, in particular, in their understandings of substantive due process? As an initial observation, we have seen that Justice Kennedy agrees with a critical tenet of Progressivism: a rejection of natural rights. Justice Stevens, on the other hand, is largely silent on the subject. Neither Justice, of course, believes natural law or natural rights are in any way relevant to the understanding of “liberty” set forth in the Fifth and Fourteenth Amendments. Both Justices, moreover, share a faith in history as an evolutionary vehicle for the continued progress and improvement of the human condition—at least in terms of individual, personal rights—in America.

We have seen in the arguments concerning constitutionally protected liberty interests advanced by both Justices Stevens and Kennedy, an identification of certain basic propositions. Despite the fact that they employ different constitutional tests, both Justices share a definition of liberty that identifies the following essential propositions: (1) the Founders did not attempt to define what “liberty” means in the Constitution, but rather left it to future generations to supply its essential terms; (2) societal mores are evolving as society matures, re-

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182. LIVING CONSTITUTION, *supra* note 143, at 111.

183. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

184. *Id.* at 460.

185. *Id.* at 466.

placing outdated misconceptions<sup>186</sup> with more advanced insights into the meaning of liberty; (3) that evolutionary process has recognized that liberty encompasses a notion of autonomous individuality that takes the form of self-definition; and (4) the Supreme Court is uniquely equipped to recognize the new liberty interests and provide them constitutional protection.

The first three of these criteria reflect the basic tenets of Progressivism. Progressivism rejects any attempt to return to the Founders' understanding of natural rights, as do Stevens and Kennedy. Progressivism sees history through the lens of evolutionary development toward more advanced notions of moral consciousness, as do Stevens and Kennedy. Progressivism derides any natural law limits on moral decision-making, thereby opening the door for essentially subjective concepts of liberty such as those advanced by Justices Stevens and Kennedy. In these critical respects, Justices Stevens and Kennedy are the intellectual heirs of Progressivism.

When laws are passed that significantly infringe upon constitutionally protected liberty interests, as defined by the Stevens-Kennedy criteria, the Court can choose to apply either one of two tests. One, the Court can describe the *purpose* and *effect* of those laws to be unexamined prejudices of the past—*animus*—that seek to, and in fact do, significantly burden the liberty interest in question. If found to meet the named criteria, the law will be struck down as failing rational basis review. This may be the preferred route if the Court, for some reason,<sup>187</sup> is not inclined to declare the liberty interest to be fundamental in nature. If the Court is willing to describe the liberty interest as fundamental in nature, the Justices can easily strike the law down by finding that it fails to satisfy strict scrutiny. While the two tests provide the Court with greater flexibility in protecting those liberties it finds worthy of protection, there is no real conceptual difference between the liberties protected under either test. The result is that the need for analyzing whether a right is fundamental or not is diminished, and this may serve to undermine our understanding of what are our nation's deepest principles; in particular, what is our understanding of liberty.

## VI. CONCLUSION

In writing the plurality opinion in *McDonald*, Justice Alito employed the familiar history and tradition test set forth in *Washington v. Glucksberg* to find the right to bear arms sufficiently fundamental that

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186. Including, and perhaps in particular, those time-bound conceptions of human nature that the Founders understood in connection with natural law and natural rights.

187. Indeed, Justice Kennedy may well have been reticent to declare same-sex sex a fundamental right in *Lawrence* given the controversy this would have aroused. The continuing controversy over *Roe v. Wade* is surely not lost on the Court.

it was secure against state infringement. As noted, in his concurrence in *McDonald*—a concurrence directed at rebutting Justice Stevens’s theory of substantive due process—Justice Scalia repeated the same “history and tradition” test. This is the test the conservative members of the Court consider appropriate when analyzing substantive due process issues.

The liberal members of the Court reject what they consider to be the time-bound jurisprudence of the conservatives. Following Justices Stevens and Kennedy, they contend for a theory of liberty interests that deserve protection under the Constitution by virtue of their expansive, dynamic qualities: qualities that embrace self-definition and a future-oriented, evolving moral consciousness.

Despite their differences, in the final analysis both the conservative and liberal members of the Court share a common theoretical foundation upon which their respective jurisprudences are built: that of history. Janus-like, they differ only in the direction they face when evaluating the teachings of history. The liberal members look to the future while the conservative members look to the past.

For the present, the understanding of constitutionally protected “liberty” that prevails in the High Court has been defined and delimited by Justices Stevens and Kennedy. Moreover, the conservative members of the Court lack a convincing counter-argument. But while both the conservative and liberal wings of the Court claim to be keeping faith with the Founders, neither embraces the trans-historical understanding upon which the Founders established their constitutional first principles. Moreover, and unlike the Founders, both can be challenged on the basis that each lacks a discriminating principle: for history alone, whether directed toward the future or the past, lacks such a principle. In attempting to steer their jurisprudential ships upon the seas of future litigation, both sides may be said to lack a star to steer by. Furthermore, no reconciliation is possible, and the Court will continue to remain divided as issues concerning fundamental rights come before it.